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I. Background

In addition to the competitive checklist items enumerated at 47 U.S.C. Section 271 (c)(2)(B), the Telecommunications Act requires an applicant to show that "the requested authorization is consistent with the public interest, convenience, and necessity."[1] The FCC has emphasized that public interest is a separate inquiry from that to be occasioned by the competitive checklist, and addresses this matter separately in its decisions.[2]

The FCC has said that compliance with the competitive checklist provides a strong indication that long distance entry is consistent with the public interest. Citing the FCC, AT&T has pointed out for us, however, that checklist compliance is not conclusive as to the public interest requirement:

> *In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications market to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.*[3]

The FCC's SBC Kansas/Oklahoma Order provides a discussion of the factors that are to be considered in addressing public interest:

> [W]*e view the public interest requirement as an opportunity to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the Congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition*[4].

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[1] *47 U.S.C. Section 271(d)(3)(c).*

[2] Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 273 (2001) ("SBC Kansas/Oklahoma Order")

[3] Reply Brief of AT&T Regarding Public Interest and Track A, (AT&T Reply Public Interest Brief).

[4] SBC Kansas/Oklahoma Order at paragraphs 272 and 273.

The New Mexico Advocacy Staff, among others, has generally argued that Qwest bears the burden of proof on matters relating to section 271,[5] but we think that a distinction must be made here. Given the FCC's conclusion that checklist compliance is a strong indicator of the satisfaction of the public interest test, we think that it is appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority. If nothing else, a simple reliance on the need for order compels the conclusion that those who make specific allegations should be required to prove them.

Thus, while Qwest must bear the burden of proving checklist compliance and the satisfaction of Track A and B requirements generally, we would not accept a rule that upon allegations by a third party, Qwest must bear the burden of disproving them in order to demonstrate that the public interest would be served by granting it 271 authority. In saying this, however, we do not intend to ask any of the participating commissions to constrain their ability to take notice of conditions in their jurisdictions – conditions as to which their long experience in regulating telecommunications services gives them more than sufficient basis for taking notice of them.

Thus, while the inquiry into the public interest, convenience, and necessity is necessarily open-ended, a number of decision criteria are clear:

- Should checklist compliance be shown and should the existence of an adequate Performance Assurance Plan (PAP) be demonstrated, Qwest need make no further affirmative showing to support a conclusion that the public interest has been met.
- Beyond these two preceding showings, as to which Qwest bears the burden of proof, those who would oppose the grant of section 271 compliance should be obliged to allege and prove the existence of the unique circumstances that may bear additionally on the public interest question (excluding the participating commissions' powers on their own initiative to take notice of such conditions as they determine to be relevant in their jurisdictions).
- Any allegation that merely serves to restate a checklist test in a manner that would impose a greater burden should not be looked upon with favor; to have distinct significance in examining the public interest an allegation and the evidence or argument that support it must rest at least in part on grounds independent from compliance with the checklist; otherwise, we would be misreading the plain intent of Congress in adopting the checklist and in allowing separate consideration of public interest matters.

II. Summary of Public Interest Conclusions

The workshop participants raised a number of public interest issues. Discussed below are the conclusions reached upon consideration of them.

UNE Prices

Several CLECs argued that monthly and non-recurring UNE prices were too high to permit CLECs to enter the local exchange market in a profitable way. AT&T's evidence to support this

[5] Brief of New Mexico Staff on Public Interest Issues (New Mexico Advocacy Staff Initial Public Interest Brief) at page 4.

conclusion was that 1FR rates were lower than UNE prices. This evidence was not persuasive; it failed to address other revenue sources (e.g., vertical features, intraLATA toll, and bundling with non-telecommunications services such as cable television) that would contribute to profitability. It also did not address business lines or resale. Moreover, the FCC has noted the difficulty that would arise were it to be required in the 271 context to address retail rate issues, which the FCC has conceded to be matters subject to state authority.

Intrastate Access Charges

Even where Qwest's affiliate pays the same access charges, or the access charges are somehow imputed, concern can arise from access charges that exceed costs. There was CLEC evidence that such charges are in excess of costs in at least some of the participating states. However, the evidence did not address the uses served by the portion of those charges that exceed costs. That evidence also did not address which carriers have access to the above-cost portions. We believe that each participating state can best decide whether current access charges are: (a) in excess of costs, and (b) available for Qwest use in a way that squeezes competitors out of the intraLATA toll market.

Post-Entry Assurance Plan

A sound plan is necessary for assuring that local markets would remain open should Qwest receive 271 approval. The QPAP, which is Qwest's means for providing that assurance, is addressed thoroughly in a companion report (*QPAP Report*) to this one. That report recommended substantial changes to the plan as filed by Qwest and, should Qwest agree to those changes, the plan would be sufficient to provide the necessary assurances.

Lack of Competition

The thrust of the arguments made on this issue was that competition has not reached a level that is sufficient to meet the public interest. We followed the FCC precedent, expressed often in prior 271 application proceedings, that there is no minimum market-entry level required. It would be wrong to apply the general public interest standard in a way that would effectively re-write section 271 Track A or Track B requirements. Competition in the seven states is generally commensurate with levels already deemed adequate by the FCC.[6] We believe that the correct use of competition levels as evidence is in the consideration of whether entry has been suppressed by a failure to make local markets open to competition. Issues related to that potential problem have been fully addressed in prior workshops. No new and unique circumstances have been demonstrated to exist here.

Prior Qwest Conduct

AT&T argued that Qwest's history of non-compliance with the section 272 separate affiliate requirements and with its obligations to serve CLECs under sections 251 and 252 compels a conclusion that the public interest would not be served by granting 271 authority now. In the workshop report preceding this one,[7] we already concluded that the predictive value of Qwest's prior 272 performance was not substantial. The section 251 and 252 examples cited here by AT&T were largely either based on CLEC complaint allegations not yet accepted as true by the

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[6] *Report on Group 5 Issues: General Terms and Conditions, section 272 and Track A*, issued September 21, 2001 (Group 5 Report).

[7] Group 5 Report.

authority trying them, insufficiently described to allow us to determine their significance, or addressed through recommended resolutions of issues that were raised in earlier workshops. To the extent that legitimate claims of problems existed, they were not of a magnitude sufficient to give concern about the ability of a soundly crafted post-entry assurance plan to deter them.

Structural Separation

Several CLECs offered structural separation as a means for mitigating the effects of Qwest actions to favor affiliates. Its proponents failed to show how structural separation would at all affect the need for the same efforts (as would be necessary in the absence of structural separation) to deter, detect, and sanction self-dealing or discrimination. Structural separation would certainly burden Qwest with higher internal transaction costs; the lack of any evidence to show that it would provide competitive benefits argues strongly against continuing claims that it is a useful remedy for assuring or allowing more facile verification of the existence of arms-length dealing.

Sustained Checklist Compliance

The carrier group ASCENT argued that Qwest should have to show checklist compliance for a sustained period before the public interest would be served by granting it 271 approval. This argument, aside from writing into federal law a requirement not seen there by the FCC, does not take account of two important factors: (a) that prior workshops have addressed claims made by CLECs regarding the problems shown by past performance, and (b) that a soundly crafted post-entry assurance plan is to be preferred over history as the proper means for assuring that current performance will not slide after 271 entry.

Inducing Competition

We agree with the general conclusion that 271 entry, where all pre-conditions are met, promotes the public interest. We also believe that both common sense and the evidence presented demonstrate that such 271 approval tends to further induce local market entry by CLECs. These factors militate in favor of 271 entry.

Other Issues

Several other issues raised concerns that either have been addressed in earlier workshop reports, are being addressed through other procedures, or are not possible to address here due to lack of evidence:

- *Advanced Services, including DSL:* These issues were fully addressed in the prior workshop report that addressed emerging services; there are no public interest concerns left open by the resolution of the issues proposed there.
- *OSS Test:* The results of the test now being conducted under the auspices of the ROC will come before the commissions individually after test completion.
- *Change Management:* As stated in the preceding report, which addressed general terms and conditions of the SGAT, there is insufficient evidence to address this issue, given the state of flux that existed in Qwest's proposed change management processes during the prior workshop that was to consider the issue.

III. Public Interest Issues Raised

A. UNE Prices

An AT&T witness testified that recurring and non-recurring UNE prices exceed Qwest's retail rates, which is a primary cause of the failure of Qwest retail markets to be open to competition. The evidence that AT&T cited in support of this conclusion came from a state-by-state comparison of 1FR rates against established wholesale prices. AT&T said that this comparison showed that local entry was unprofitable on its face at prevailing UNE prices.[8] Sprint joined in AT&T's argument about UNE prices.[9] ASCENT, an industry group formerly known as the Telecommunications Resellers Association, also joined in the concern about cost-based UNE prices.[10]

Qwest argued that the FCC has already determined that the ability of CLECs to profit after leasing UNEs is irrelevant – the only relevant test is whether the prices for UNEs are cost based.[11]

Discussion: It is clear that checklist compliance requires UNE pricing to meet the standards of the Act. However, as we noted many times in the preceding reports of these workshops, we have not taken evidence on or given consideration to the satisfaction of the applicable standard by Qwest wholesale prices. Therefore, we have pointedly avoided any conclusion about those wholesale prices in connection with checklist compliance. That issue remains one for the states to address through some other means.

CLECs such as AT&T demonstrated at the workshops that they did have concerns about whether Qwest's wholesale prices satisfied the checklist requirements, and they recognized that those issues would be addressed elsewhere. The parallel and perhaps interrelated argument that they have made here is that the 1FR rate comparison demonstrates that Qwest's local markets are closed to competition.

That analysis failed to persuade for many reasons. First, it did not recognize that local rates consist of much more than the basic monthly charge for service. Vertical features and intrastate toll revenues must be considered, as another CLEC, WorldCom, pointed out when criticizing Qwest's analysis of lost CLEC profits in connection with consideration of the QPAP.[12] AT&T conceded that it had made no effort to measure or to take account of such other revenues. Second, AT&T's analysis did not consider the existence of resale as an option for certain service classes that do not lend themselves to economical competition through the use of UNEs. Third, AT&T did not provide any evidence of business rates; it did not even provide its simple comparison of basic rates for such service. Fourth, AT&T did not address the issue of what

[8] Brief of AT&T Regarding Public Interest and Track A, (AT&T Initial Public Interest Brief) at pages 6 and 7.
[9] Sprint Communications Company L.P.'s Brief Regarding Track A and the Public Interest (Sprint Initial Public Interest Brief) at page 4.
[10] Comments of the Association of Communications Enterprises Regarding Qwest Corporation Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act (ASCENT Comments) at page 21.
[11] Qwest's Reply Brief Regarding its Compliance with the Track A Entry Requirements of 47 U.S.C. §271(c)(1)(A) and the Public Interest Test of 47 U.S.C. §271(d)(3)(C)
[12] Comments of WorldCom, Inc. in response to Qwest Corporation's Proposed Performance Assurance Plan, 7/27/2001.

"subsidies" might be available to it in the event that it should serve qualifying residential lines through facilities-based competition.[13]

Having conducted, advised in, or otherwise participated in numerous arbitrations, many of them involving AT&T, we have seen substantially more robust and useful analyses of revenues to be secured through leasing UNEs. Moreover, those came generally before efforts by CLECs, AT&T included, to bundle yet additional services (such as cable television) with basic monthly service. The revenue analysis that AT&T presented here was by comparison so incomplete as to render it of inconsequential value in assessing the state of local markets in Qwest's local exchange serving areas. Whether or not Qwest's UNE rates meet the checklist remains a question not resolved by these workshops. We can say, however, that the dimensions of that question have not been altered by AT&T's simplistic comparison of basic 1FR rates with UNE prices.

Even were it founded on substantial evidence, AT&T's argument would still be of questionable relevance, given the FCC's holding at paragraph 92 of the *SBC Kansas/Oklahoma Order*, which provides:

> *The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a states' retail rates, something which is within the state's jurisdictional authority, not the Commission's.*

B. Intrastate Access Charges

AT&T presented testimony that Qwest's intrastate access charges in the seven participating states range from a low of 1.25 to 4.91 cents per minute, while the FCC has established rates at 0.55 cents per minute (assuming single carrier origination and termination) as a cost-based target for interstate access rates. AT&T said that, even with imputation of these access rates to Qwest retail revenues, CLECs would be squeezed out of the local market.[14] Qwest said that it should be sufficient that its 272 interLATA affiliate pay the same access rates as Qwest charges to competitors.

Discussion: We begin by questioning Qwest's view that it is sufficient that its affiliate pays the same access charges that competitors do. The difference, and it can be a material one, is that the access charges paid by the Qwest affiliate inure to the family of companies to which Qwest and that affiliate belong. CLECs do not pay those access charges to an entity with whom it shares an interest in bottom line results; instead, it pays them to Qwest as a competitor. A proper inquiry into this issue must go beyond equality of payment; it must address the uses to which the access charges paid by or imputed to a Qwest affiliate are put. Whether they go to a universal service fund or offset facilities costs (for purposes of retail and wholesale rates), for example, has much to do with whether competitors are squeezed out of certain local markets.

Since the adoption of the Telecommunications Act of 1996, there has been recognition that the introduction of competition and the maintenance of cases where rates were set substantially in

[13] AT&T did say in its brief that other services would not change its analysis, and that the resold services discounts were inadequate. These assertions by its lawyers, unsupported by any cited evidence whatsoever, have no foundation in the record before us.

[14] AT&T Initial Public Interest Brief at pages 12 through 14.

excess of costs would be very problematic. The challenge has been to assure that those "subsidies" that remain important (ability to pay, rural service cost premiums, and service to public institutions being most often cited among them) are structured in a way that makes them more compatible with competitive pricing. It would be overly generous to say that the FCC has fully met this challenge in interstate service pricing; we expect that the seven participating states have, at least for the most part, significant ground to cover as well.

Our problem here is that there is no evidence before us to examine this issue as it absolutely must be examined, on a state-by-state basis. The size of any argued "subsidy" in intrastate access costs is not the only issue. For one example, how the fruits of any revenues that exceed full economic costs are allocated is equally relevant. Imputation can substantially mitigate the competitive barriers that above-cost services can create, provided that they are distributed and accounted for in ways that reflect the needs of competition and of competitors.

The lack of evidence in this record on these related questions leaves us limited to a general observation that a sensitive examination of how intrastate costs are recovered and how any added margins are distributed is self-evidently critical to assuring that undesirable barriers to competition are avoided. We must provide to each of the participating commissions an analysis of how far their states have come in leveling the competitive playing field in a manner that is consistent with public policy in each state's jurisdiction.

C. Post-Entry Assurance Plan

A number of participants have addressed the need to assure that there exists a sound performance assurance plan. That issue was addressed in the accompanying *QPAP Report*. As that report found, with the changes recommended, the so-called QPAP will provide adequate incentives to assure that Qwest's local-exchange-service markets remain open after it may receive 271 approval from the FCC.

D. Lack of Competition

The New Mexico Advocacy Staff has argued that Qwest's New Mexico local market has been shown not to be open due to the lack of competition in sizeable amounts.[15] A number of other parties have made similar arguments, citing the same evidence that we examined in considering satisfaction of Track A requirements.[16]

The initial brief of the Iowa Office of Consumer Advocate has discussed generally the difference between expectations and current reality about the growth of local exchange competition, the difficulties that CLECs (and BOCs who have made some inroads into local markets outside their local serving regions), view that high profits are being earned by Qwest in Iowa, Qwest's failure to compete against other local exchange carriers in its region, the lack of cable television to emerge quickly as a facilities-based alternative, the uneven distribution of competition that is weighted toward high-end customers, and the struggles of CLECs to thrive financially. It then asks that 271 authority not be granted until greater and "sustainable" entry by CLECs into the local exchange market occurs.

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[15] New Mexico Advocacy Staff Initial Public Interest Brief at page 6.
[16] See for example the AT&T Initial Public Interest Brief at page 3 and the Sprint Initial Public Interest Brief at page 2.

Discussion: We must be careful not to confuse the issue of whether the door to the "room" where CLECs will compete is open with the issue of whether it is occupied by them. The Track A and B construct established by the Congress clearly implies that the more precisely defined requirements of section 271 can be met in an empty room, provided we are certain that the door has been unlocked.

It would not serve the intent of Congress properly to read into a general requirement specific thresholds that Congress did not write into the more specific elements of the tests that it established. The generality of the public interest requirement is shown by its consistency with the public convenience language that is common to statutes empowering public service commissions to regulate utility prices and service all across the country. It cannot be seriously argued there, and it should not be here, that such language should serve as a ratchet wrench for tightening specific requirements. This conclusion is entirely consistent with what the FCC has told us on a number of occasions in addressing section 271; i.e., there is no explicit or implied minimum market penetration test, which we discussed at length in the last report of these workshops, addressing Track A.[17]

The relevance of market penetration to the public interest test in our view is whether low levels of market penetration provide evidence that Qwest has not taken sufficient actions to allow CLECs free entry in accord with statutory and regulatory requirements of the federal and state governments.

We have already concluded that Qwest's entry in these seven states (subject to the lack of convincing Qwest evidence about residential service, whether facilities based or through resale, in Idaho and New Mexico) is lower than a number of states where 271 authority has been given, but is not out of line with the level of entry shown by evidence in some states (e.g., Kansas and Oklahoma). We must therefore look to other allegations and evidence that bear more directly on the question of whether Qwest has opened the markets in question.

The Iowa Office of Consumer Advocate argues either against the merits of the federal act itself or against what is at least implicit in the FCC's implementation of it. Moreover, the office's own evidence shows that local exchange competition in Iowa exceeds significantly what was shown to exist in other cases where the FCC granted 271 authority. It is difficult to see what is to be gained by placing Qwest under a standard that varies significantly from the one being routinely applied by the FCC. Whether that standard is to our personal liking or not is not the issue; what is material is that Qwest meets the law and the precedent established by the FCC insofar as market penetration is concerned.

Finally, we address the issue of the turbulent financial times that CLECs face. Evidence of CLEC failures or of shrinking profit margins is not without interest, but it is ultimately even more tangential than market share data. That data, while itself not determinative under FCC precedent, shows according to Qwest's unrebutted evidence, that CLEC market share early in 2001 was actually increasing.[18]

[17] Group 5 Report.
[18] Qwest Public Interest Reply Brief at pages 25 and 26.

F. Prior Qwest Conduct

AT&T cited what it saw as a pattern of past and continuing Qwest conduct that violated: (a) the pre-271 approval limits on in-region, interLATA service and (b) Qwest's obligations to provide wholesale services to CLECs.[19]

Discussion: We have already addressed the significance to be attached to Qwest's past provision of services deemed by the FCC to constitute in-region, interLATA service, under the second unresolved *Separate Affiliate Requirement* issue in the immediately preceding report in these workshops.[20] As we recommended there, we continue to say here that we do not believe that the nature of those violations should be predictive of Qwest conduct after 271 approval may be granted. We do not view the public-interest standard to be a punitive one, but rather a forward looking, or predictive one. Consequently, we do not believe that the prior history of Qwest's performance in this regard demonstrates the kind of unique circumstances that the FCC believes it takes to support a finding that Qwest's entry into the in-region, interLATA market would contravene the public interest.

AT&T also cited a number of instances that it claims demonstrate that Qwest does not meet its section 251 and section 252 requirements in providing wholesale services to CLECs. For the reasons set forth below, we find that these examples do not provide substantial evidence of a predictive, patterned refusal or inability of Qwest to comply with its wholesale service obligations in the past:

- *Minnesota example:* AT&T cites to no final order but only interim relief, and that on a question that remained the subject of a good-faith dispute in our workshops, and on which we have recommended a clear resolution that should preclude such a dispute in the future
- *Washington NID and inside wiring example:* That issue related to sub-loops, an area of network access that remained unsettled as late as the time of our workshops addressing the subject. In our workshops, AT&T and Qwest took positions similar to those apparently taken earlier in Washington; we recommended a solution that was different from and in between the positions that each considered appropriate. We find nothing predictive in this example, particularly given the clear resolution of the sub-loop access disputes in the prior workshop report.[21]
- *Sun West Example:* This example is particularly unpersuasive; AT&T cites to the allegations of a complaint by a third party in a non-participating state; moreover, its witness did not claim any personal knowledge of the facts there – facts which have not been provided in any case at a level of detail sufficient for us to make an assessment of their significance here, even if we were to anticipate the results of litigation by presuming those allegations to be true.
- *MCI Metro Example:* The testimony providing this example similarly failed to provide a substantial enough description of the underlying facts to allow us to determine the

[19] AT&T Initial Public Interest Brief at pages 15 through 18.
[20] Group 5 Report.
[21] See the *Report on Emerging Services,* under the *Subloop Unbundling Issue* titled *Requiring LSR's for Access to Premise Wiring at MTEs*, at page 30. (Subloop Unbundling)

significance of the example here or what we may or may not have done to preclude its occurrence here.

- *Rhythms Example:* Again, only the allegations of a complaint by a third party are provided and with no indication that the AT&T witness has any independent knowledge regarding their truth.

Consequently, we find these examples insufficient to demonstrate a pattern of past abuse that is either: (a) insufficiently mitigated by our resolution of disputed issues in prior workshops, (b) so severe as to give reason to doubt the ability of an otherwise effective QPAP to mitigate, or (c) so pervasive and significant as to call into question the public interest of permitting Qwest to enter the in-region, interLATA market.

G. Structural Separation

AT&T said that structurally separating Qwest's wholesale and retail operations is the only solution to what it called the[22]

> *fundamental conflict of interest between Qwest's relationship with its retail customers, on the one hand, and its relationship with its wholesale customers on the other.*

Sprint joined in the AT&T structural separation argument.[23]

Qwest said that there is no statutory authority allowing forced structural separation, and that neither the FCC nor any state has required it.[24]

Discussion: The ability to order structural separation is not the one before us; the question is whether, in the absence of structural separation, Qwest's 271 approval would meet the public interest test. We must be mindful, however, that there would be a knotty statutory construction problem should we reach a point where structural consideration were to be considered a matter of substantial public interest. Specifically, we would have to consider what to make of the section 272 specification of services for which a separate affiliate is required. That list of services is quite specific, and does not include the provision of wholesale services (after 271 application approval) to both affiliated and non-affiliated carriers serving end-users.

That said, it is moot because we believe that structural separation would do nothing to change the motivations in question, nor would it mitigate the consequences of acting on those motives. Only a spin-off of an incumbent's wholesale and retail operations will do that. AT&T's reply brief (at page 14) shows a misunderstanding of the difference between structural separation and spin-off. The AT&T divestiture under compulsion was an example of spinning off, not mere structural separation; analogizing it to what was recommended here or to what the Pennsylvania Public Utility Commission did provisionally (but not finally, it is important to note) is inapt.

The principal effect of structural separation would be to make the Qwest interfacing entities separate corporations rather than separate departments of the same corporation. Such a change will fail to influence materially, if at all, the natural motivation to favor an entity with the same ultimate owners. It will also have no effect on the efforts that are necessary to deter, detect, and

[22] AT&T Initial Public Interest Brief at page 23.
[23] Sprint Initial Public Interest Brief at page 4.
[24] Qwest Reply Public Interest Brief at page 31.

sanction inappropriate interactions. As would be true before structural separation, what will continue to be necessary are the following aspects:

- Rules and procedures to govern interaction.
- Training in what those restrictions require.
- Instilling an acceptance of the high importance of complying with the restrictions.
- Routine, ongoing, and comprehensive outside auditing and other review of interactions, including but not limited to transactions between departments or corporate entities.
- Sanctions against individuals for failing to comply with requirements.
- Redress of harm to third parties and appropriate sanctions against violations that provide inappropriate benefit to the perpetrating entity or harm to third-party competitors.

When one examines these efforts, it is clear that changing the Qwest entities that interface with each other from work groups, departments, or divisions, on the one hand, to separate corporate entities, on the other hand, will occasion no change in the nature or the extent of the diligence required. All that structural separation will do is increase the transaction costs that will inevitably follow corporate separation (or for that matter, separation at any increased level of organizational hierarchy.) The point here is not to occasion a general increase in Qwest's costs of doing business and thereby to increase CLEC competitiveness automatically. Rather, the point is to deter, detect, and sanction failures to conform to rules about self-dealing. Structural separation having no connection therewith, we recommend categorically that it be rejected as a solution.

H. Sustained Checklist Compliance

ASCENT commented that a public interest showing requires that Qwest be required to sustain compliance with the checklist over a period that is characterized by "a robust and thriving competitive local market."[25]

Discussion: We have already addressed the inappropriateness of applying a test that relies upon the amount of competition, as opposed to the maintenance of open market conditions. Here we must address whether there need be a minimum period of time across which Qwest should have to demonstrate checklist compliance. We are unaware of any such requirement's adoption by the FCC. Moreover, it is both adequate and preferable to rely instead upon a sound PAP, as opposed to a history of compliance, as the means for assuring that markets will remain open.

I. Inducing Competition

Qwest cited a report of the New York Public Service Commission, which noted that CLEC market share increased by 130 percent (to 20 percent of the state market) in the year following the FCC's granting of 271 approval there.[26] Qwest also cited the FCC conclusion expressed in paragraph 428 of the Bell Atlantic–New York (Verizon) 271 order, which was that additional competition in interLATA telecommunications markets generally promotes the public interest.

The witness for the Iowa Consumer Advocate testified that we should consider the facts that Qwest has a long-standing relationship with its customers and that carrier-changing transaction costs will create an impediment for CLECs in securing customers. He then said that in

[25] ASCENT Comments at page 4.
[26] Qwest Initial Public Interest Brief at page 44.

overcoming barriers like these, it would be helpful to continue to limit to CLECs the ability to bundle local and interLATA long distance services, which means denying Qwest 271 approval.[27]

Discussion: The market size, demographics, and geography of New York differ from those of the states participating in these workshops. It would be speculative to extrapolate quantitative results from there. However, there is reason to believe that the opening of the in-region, interLATA market to Qwest will have the effect of inducing carriers in that market to accelerate their efforts to enter the local exchange market. The service bundling concept that so many carriers espouse will require response by CLECs. If all other things be appropriate in terms of market openness, we would be correct to consider the potentially beneficial effect that Qwest 271 approval will have on growing competition in the local exchange market.

The Iowa Consumer Advocate's position regarding Qwest's advantages makes correct factual statements, but fails to recognize that those advantages will always exist at the outset of in-region, interLATA competition, whenever it begins. They form an inevitable part of competition, as do competitive advantages that CLECs have. It is not the goal of the Congress to equalize commercial advantages, but merely to neutralize those that are unduly gained from a competitive perspective. Reputation and service-transfer costs are not among those.

As to the issue of permitting bundling by both CLECs and Qwest, the Iowa Consumer Advocate's testimony essentially begs the same question Congress asks the FCC to answer with the consultation of state commissions and the U.S. Department of Justice. We cannot decide that it is categorically wrong to allow bundling because it will deter local market entry; it is the evident result that the Act itself anticipates, when applicable conditions have been met. The role of those who would participate in implementing the Act is to decide whether those conditions have been met. On that question, the evidence and argument of the Consumer Advocate is most welcome; on the merits of the Act itself, that office's judgment is, like our own, irrelevant.

In sum, the thrust of the Consumer Advocate's testimony on the conditions that are arguably material here is that competition has not reached sufficient levels, nor have CLECs shown sufficient financial strength to provide confidence that local markets are or are likely to remain open. Those arguments have already been addressed.

J. Other Issues

The participants raised a number of other issues, which have been addressed in other workshops. These issues include the OSS test,[28] DSL and advanced services,[29] and change management.[30] The results of the OSS test that is being conducted under the auspices of the ROC will come before the participating commissions later. We spent considerable time on advanced services, including DSL, in the emerging services workshop and the report thereon addresses the issues raised in detail.[31] The Group 5 Report addressing general SGAT terms and conditions discusses the lack of evidence that precludes us from addressing the sufficiency of Qwest's change management processes.

[27] Opening Brief: Public Interest, Office of Consumer Advocate, Iowa Department of Justice at page 22.
[28] ASCENT Comments at page 19.
[29] ASCENT Comments at pages 16 through 18; New Mexico Advocacy Staff Initial Public Interest Brief at pages 23 and 24.
[30] Sprint Brief at page 4.
[31] Group 5 Report.